United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
JULIUS WASSERSTEIN

75-1422

3 pgs.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No.: 75-1422

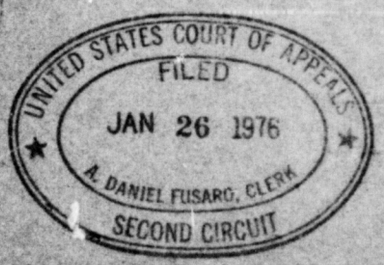
MARIZA DE LOS SANTOS,

Appellant.

----------x

BRIEF
~~MOTION~~ ON BEHALF OF APPELLANT

DE LOS SANTOS



JULIUS WASSERSTEIN
Attorney for Defendant-Appellant
Los Santos
26 Court Street
Brooklyn, New York
(212) 237-1387

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STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered December 8, 1975 in the United States District Court for the Southern District of New York (Bonsal, J.) convicting appellant after trial of possessing with intent to distribute cocaine in violation of Title 21 U.S.C. Sec. 841 (A) (1). Appellant was sentenced to two years imprisonment pursuant to Section 3651 of Title U.S.C., as amended, with provision for her to be confined six months and the remainder of her sentence to be suspended. Upon the expiration of her confinement, appellant was ordered placed on probation for a three year period.

Appellant's sentence has been stayed pending the determination of this appeal.

QUESTIONS PRESENTED

1. Whether the Court's failure to charge the jury on the defense of coercion constituted reversible error.

2. Whether the Court's failure to charge the entrapment defense as to appellant constituted reversible error.

STATEMENT OF FACTS

On October 21, 1975, appellant, Mariza De Los Santos, and her co-defendant, Walter Swiderski, proceeded to trial on a two-count indictment charging them with possession with intent to distribute both marijuana and cocaine in violation of Title 21 U.S.C. Sec. 841 (a)(1).

GOVERNMENT'S CASE

MARTIN CHARLES DAVIS, 29 years of age and unemployed, testified that in August of 1973, he first came in contact with the Drug Enforcement Administration after he had sold several ounces of marijuana. (24-25)* Initially, Sergeant Egan from the New York City Police Department asked him if he would be willing to co-operate as they were interested in purchasing large amounts of narcotics. (26) He replied that he did not want to have anything to do with such a venture.

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*Numerical references are to the pages of the trial transcript.

Two months later, Special Agents Tom Fekete and Jose Keefe telephoned him and thereafter told him that the Federal Government had more money than the City. When asked if he would be willing to co-operate, Davis told the Agents that he had lost his drug contacts during these past two months and did not know any drug dealers. However, since he had no money, he did agree to co-operate. (28) Because of his co-operation with the Government, he had received about $10,000. (29-30)

According to Davis, in the early fall of 1972, he had joined an electronics corporation which displayed lighting devices to the public. (37) In November or December of 1973, a Jeffrey Cawl brought the Defendant Swiderski to see the lights. (4) Swiderski immediately told him that he was selling THC, which is similar to hashish. (40) Davis tried it and described his experience as being similar to a psychedelic trip. (41) Swiderski asked him not to tell Cawl about this and to deal with him directly, since Cawl would want a commission. (41)

On May 31, 1975, pursuant to a message he had received from his phone service, Davis met Defendant Swiderski who told him that he wanted to purchase one-quarter pound of cocaine and showed him about $3,000 or $4,000. (43) Defendant Swiderski explained that it was his birthday and therefore he expected Davis to arrange this deal for him as soon as possible. (43)

Davis reported this incident the next day to Special Agent Fekete and was instructed to allow Swiderski to make the purchase, after which he would be seized. (45) Accordingly, Davis then contacted Gene Casey, who represented a dealer named Carlton Bush, and made arrangements for the purchase. Next, on June 2, 1975, he telephoned Swiderski who agreed to meet him at the Hotel Chelsea the next day at about 2:00 p.m. and agreed to pay $4,600 for four ounces of cocaine. (48)

Davis further testified that on June 3rd, Defendant Swiderski and appellant arrived at his hotel where Swiderski showed him the money. (48) They went downstairs and picked up someone named Williams, who was in front of the hotel. The four of them then got into a van and drove to 58 West 48th Street. (51) Bush first signalled to him in a small room and said "Let's do it as fast as possible." (52) Davis in turn signalled the Defendant Swiderski and the three of them stepped into this small room. Swiderski looked at the cocaine first and then asked appellant to come into the room to examine it. (52) Both Defendant Swiderski and appellant snorted some of the cocaine. Next, Swiderski performed a "burn test." (53) Additionally, Swiderski and appellant wanted to perform a third test, a "bleach test." (53) Thereafter, appellant told Defendant Swiderski that the cocaine was not good enough for their personal use, but they could sell it and that Bush should produce more of the drug. (54) Bush stated that if they brought the one ounce, he would bring the other

three ounces later that evening to finish the deal. (54-55) It was further agreed that they would give Bush $1,250 for the one ounce and would return at 6:00 p.m. for the remaining three ounces. Defendant Swiderski told Bush that he wanted a "reliable and heavy coke connection," and that in another few days, they could take another one-quarter pound of cocaine. (55) Defendant Swiderski then put the cocaine into his pocket and they left the apartment. Upon returning to the Chelsea Hotel, Defendant Swiderski told him that they would sell that ounce to someone. (58)

GERALD LINO, a New York City Police Officer, testified that on June 3, 1975, he was surveilling the area of the Hotel Chelsea since he had been informed that a narcotics transaction was to be conducted during the course of that day. He and his fellow officer were dressed as undercover agents. (134) There he observed a blue van which was parked in front of the Hotel Chelsea. Four people then got into this van and proceeded to West 48th Street. They went into a building where they stayed about 40 minutes. (136) Next, Defendant Swiderski, appellant and Davis left the building and entered the van. At 34th Street and 8th Avenue, the van was stopped and Defendant Swiderski, in an attempt to get away, hit their car a number of times. (136-138) From appellant's pocketbook, they seized some white powder, $3,700 in cash, and some marijuana. They found $600 in cash in Defendant Swiderski's possession. (142)

DEFENSE

DEFENDANT WALTER SWIDERSKI, 29 years of age, testified that he and appellant, who was his fiancee, were presently living in Clifton, New Jersey. He stated that he had never been convicted of any crime and had attended both Rutgers and Farleigh Dickenson College. (195-96) He was presently employed in the Isle of View Boutique which is owned by appellant, and he also did painting jobs for the Moor Painting Company. (197)

According to Defendant Swiderski, he has known Davis since November of 1973 and first met him at the "Photon" in Greenwich Village. (198, 199) He was introduced to Davis in order that he could buy some marijuana. (199) He thereafter saw Davis on about 20 to 25 different occasions. They would meet socially, and Davis would offer to sell him anything from marijuana to television sets. (199-200) Davis told him so many stories that he was totally unbelievable. On a few occasions, Davis supplied him with marijuana which was for his own personal use. (200-201) Prior to his meeting Davis, he had never before used cocaine. (199)

In the beginning of 1974, Davis telephoned him and told him to meet him at his apartment in Greenwich Village. (201) He went there and Davis' friend had some cocaine which he had never seen before. Swiderski at this time refused to buy any of the cocaine. However, he did continue to meet Davis and on several other occasions, Davis would give him some cocaine to try. (203)

On one particular occasion in March of 1975, he met Davis who was with a 17-year-old girl at a Seafood restaurant. (204) Davis attempted to get him to take the afternoon off and enjoy a party with this girl. (204) He warned Davis that he would go to jail on a morals charge. He then snorted some cocaine in the bathroom with Davis. (204-5)

Swiderski further testified that prior to June of 1975, he had never purchased any cocaine but had purchased marijuana from Davis. (205) On his birthday, which was May 31st, Davis telephoned him and said that there might be some marijuana available. (206) Davis had a few pounds of marijuana there. He tried the marijuana but did not want to buy it. (208) Davis then told him that as it was his birthday, he'd give him some cocaine as a gift. (208) Davis, after speaking to two other males, told him that there was no cocaine then available but asked if he would like to try some speed. (210) He did taste some and Davis then told him that he could become rich from selling this product. (210) Swiderski still insisted that he would not buy it. Appellant then called the hotel, since she wanted to be with him on his birthday. (212)

On June 3rd, he and appellant were going to attend the National Boutique Show located at the Hotel McAlpin on the corner of 6th Avenue between 33rd Street and 34th Street. (213) They intended to buy some things wholesale for the boutique, and they also were going to buy some clothing for their own wardrobe. (216) However, early that morning, Davis telephoned him and told him that he would be able to get some

cocaine. Swiderski said okay and went back to sleep. (219) An hour later, Davis again telephoned and told him that he had some friends who would give him some cocaine. (216) At about 3:00 p.m., both he and appellant went to the Chelsea Hotel, but Davis asked them to take him and another person to a party. (222) Although appellant stated that they should take a cab, he nevertheless gave them a ride in the van which was owned by appellant. (222-223) They proceeded to West 48th Street where Davis invited them both to come upstairs. It was only after much coaxing, that they went up to the apartment. (224-226) Davis then called him into a separate room where he was about to snort some cocaine. (229) After a few minutes, Swiderski asked appellant to join him in this room as he did not want to leave her with the other people. (228) Both he and appellant snorted some of the cocaine and Davis snorted the remainder of it which was spread on a mirror. (229) Suddenly, Davis became quite excited and asked what he would take. Swiderski asked appellant what he should do, and she replied they should take a gram in order that they would not aggravate anyone in the room. (230) Davis, however, protested and insisted that they had to take the whole package. (230) Swiderski asked Davis how much it would cost for them to leave and Davis told him $1250. (231) He asked appellant for the money, which she gave him. According to Swiderski, he was afraid that if they did not produce the money, they would be beaten up. (231) He gave this money

to a black person. (232) Upon his paying the money, Davis tried to convince the people that they would return at 6:00 p.m. to purchase the remainder of the drugs. Someone then dropped the cocaine into appellant's handbag and Davis told the people there that he and appellant were going to drive him back downtown. (232-233) They left the apartment and drove Davis to the Chelsea Hotel. (233) At 8th Avenue and 34th Street, when he stopped for a traffic light, a car shot in front of him. (234-35) Two people who were dressed in dungarees got out of the car. Appellant started screaming that they would be killed and robbed. (236-37) He put the car in reverse and attempted to get away. They had no idea that the men were police officers, but as soon as they learned this fact, he stopped. (238)

He denied ever selling or offering to sell drugs to Davis. (238) On June 3, 1975, when he took the cocaine, he had no intention of distributing it to anyone and paid the $1250 only to get out of the room safely. He has never known appellant to purchase or sell drugs. (239-242)

APPELLANT, 25 years of age and a graduate of Marymount Manhattan College, testified that she was presently the owner of a boutique. (282-283) She had never sold or purchased drugs in her lifetime from anyone including Martin Davis. She did admit that she had used cocaine a few times when Davis would give it to them for nothing. (285-286)

On June 3rd, she and Walter left their apartment in New Jersey and were going to a boutique show at the McAlpin Hotel. (286) She had $5000 in her possession, which she intended to use to purchase clothes for both herself and the boutique. (287) There was also some marijuana in her purse, which was only for her personal use. (288)

At about 3:00 p.m. on that day, they first went to the Chelsea Hotel and Davis told them that they had to go elsewhere to be turned on. (290) They arrived at a building on West 48th Street and went into a small apartment. (291) After ten minutes had elapsed, Walter called her into the bedroom where she snorted some cocaine that was passed around. Davis kept insisting that they had to take a gram. (293) She got frightened and asked Walter how much it would cost for them to leave the place. She had no intention of purchasing any drugs when she arrived at the apartment. Someone then told her that it would cost $1250 for them to leave. Walter asked her for her bag and took some money from it. (267-268) The white powder could have been put in her bag. (298)

Thereafter the Court stated that it would charge the defense of entrapment, although as a matter of law it could not see it. (335) Appellant's counsel then informed the Court that both defendants were relying in part on the entrapment theory. (342) The Court asked whether appellant's claim of entrapment was inconsistent with her defense that she really did not know anything about the scheme. (342-343) Counsel in turn argued that the defense of entrapment should be available

to appellant since she is charged with aiding and abetting Defendant Swiderski. (343-344) The Court then ruled that it would charge entrapment only as to the Defendant Swiderski. (346, 350)

GOVERNMENT'S SUMMATION AND CHARGE

In order to avoid repition, the portions of the Government's summation referring to the entrapment defense and the Court's charge on this subject will be set forth in the argument.

At the conclusion of the Court's charge, appellant's counsel excepted to the Court's failure to include in its charge some language regarding threats. (446)

ARGUMENT
POINT I

THE COURT'S FAILURE TO CHARGE THE JURY ON THE DEFENSE OF COERCION CONSTITUTED REVERSIBLE ERROR.

The thrust of the defense in this case was that both appellant and Swiderski were forced to buy the cocaine for fear of bodily harm. Both defendants in no uncertain terms testified that they bought the cocaine only because they did not think they would be permitted to leave the apartment safely. Under these circumstances, the jury should have been given the option of deciding the truthfulness of this serious factual question, and the Court's failure to charge the jury on the defense of coercion constituted reversible error.

Ordinarily, a defendant may not contest on appeal an omission from a charge unless before the jury retired he "stated distincly the matter to which he objects and the grounds of his objection." Fed. R. Crim. P. 30; See United States v. Bynum, 485 F. 2d 432, 436 (2d Cir., 1973); United States v. DeKunchak, 467 F. 2d 432, 436 (2d Cir., 1972); United States v. Barry, _F. 2d._ (2d Cir., decided 6/18/75) Here, appellant's counsel at the conclusion of the Court's charge excepted to the Court's failure to charge on the issue of threats. Such a request can surely be construed as a request to charge on the defense of coercion, since the record demonstrates that such a defense, for all ostensible purposes was the only cognizable defense available to the two defendants.

The Government in its summation likewise recognized that coercion was one of the issues to be decided by the jury when it stated:

> "The other defense -- and this was floating around in here -- not that we were entrapped, but we were coerced by Marty Davis; we were coerced by him to do this. He told us we had to go up there, we had to do this and he would make a big stink if we didn't do this. (369)

Since the Court failed to charge the jury regarding the only available defense to appellant, and since her counsel had requested such a charge, appellant's conviction must now be reversed and a new trial ordered.

POINT II

THE COURT'S FAILURE TO CHARGE THE ENTRAPMENT DEFENSE AS TO APPELLANT CONSTITUTED REVERSIBLE ERROR.

The Court charged the jury that appellant could be found guilty if she aided and abetted Swiderski in the alleged narcotic scheme. It is settled law that an aider and abettor must have the same knowledge and intent required of the principal. United States v. Hernandez, 290 F. 2d 86 (2d Cir., 1961). Therefore, it necessarily follows that if the principal as a matter of law was entrapped into the transaction, this defense must likewise inure to the aider and abettor.

Furthermore, the facts of this case compel this conclusion. Although the Government knew full well that the Court was not going to charge the jury on the entrapment defense as to appellant, the Government nevertheless clearly impressed upon the jury that appellant was raising such a claim. Throughout its summation, the Government continually assumed that both Swiderski and appellant were raising the claim of entrapment.

First, the Government informed the jury that the entrapment defense was a major issue in the case. (358) The Government next went on to demonstrate that there was a fundamental inconsistency between both defendants' defenses:

> "Mr. Swiderski has claimed he was entrapped into doing what he did and Miss Do Los Santos, on the other hand, contends that she didn't know what was going on.
> One says 'I did it but I did it because I was entrapped.' The fiancee says 'I didn't know what was going on.'" (358-59)

Thus, in this regard, had the Court charged entrapment as requested by appellant's counsel, the Government would not have been able to claim

that both defendants had inconsistent defenses, and therefore they must be guilty.

But even more devastating to appellant, the Government assumed in its summation that appellant was raising this defense notwithstanding that the Court had already placed on the record its refusal to charge entrapment as to her. The Government repeatedly placed appellant's propensities into issue:

> "Enticed? Entrapped? Led around? 29 years old, 27 years old, being led around by the nose? All of Government manufacture?
>
> How did two mature adults get up there with $6000 led by a moral degenerate?"

The Government then stated:

> "His Honor will tell you, I believe, that in the entrapment defense you will consider something as to the willingness to commit the crime.
>
> Did somebody have a propensity to commit the crime. You can look at the history of the individuals to determine whether they are familiar with the substances or whether they are just like you and I and we don't have much familiarity with the substances."

The Government concluded its remarks on this subject by stating:

> "Were they trying to get away or were they entrapped? Were they innocents entrapped?"

Hence, given the peculiar set of circumstances in this case, it should be found that the Court's failure to charge the entrapment defense as to appellant constituted reversible error.

POINT III

PURSUANT TO THE FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28 (i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEF FOR THE CO-DEFENDANT SWIDERSKI ARE INCORPORATED BY REFERENCE.

CONCLUSION

FOR THE ABOVE STATED REASONS, APPELLANT'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully Submitted,

JULIUS WASSERSTEIN
Attorney for Defendant-Appellant
Los Santos
26 Court Street
Brooklyn, New York
(212) 237-1387